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In The

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,

Respondent,

-vs-

JOHN DI GILIO,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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EDITOR'S NOTE

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Questions Presented

1. Whether the fact that the defense may hve had access to information indicating that a government witness is testifying falsely negates the government's responsibility to correct the testimony?

2. Whether petitioner is entitled to a new trial where false testimony of a government witness supplied the proof of the key element of the offense of conspiracy, viz. agreement and participation in planning?

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IN THE
SUPERIOR COURT OF THE UNITED STATES
OCTOBER TERM, 1985

UNITED STATES OF AMERICA

-vs-

JOHN DIGILIO, Petitioner

PETITION FOR A WRIT OF CERTIORARI
TO THE THRID CIRCUIT COURT OF APPEALS

Petitioner prays that a writ of certiorari issue to review the judgments of the Third Circuit entered in this proceeding on December 5, 1984 and January 2, 1985.

OPINION BELOW

The Judgment Order of the Third Circuit Court of Appeals and Order of the district court are appended to this petition.

JURISDICTION

The jurisdiction of the Supreme Court to review the Final Judgment of the Third Circuit Court of Appeals is based on 28 U.S.C. §1254(1)

CONSITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Petitioner seeks review of issues of law arising under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

ORDER EXTENDING TIME TO FILE PETITION FOR CERTIORARI

An application was made to Associate Justice William Brennan, Jr. seeking an extension of time within which petitioner could timely file the within petition for certiorari. Justice Brennan issued an order extending the time until April 2, 1985.

Statement Of The Case

I.

Introduction

This petition is submitted on behalf of John DiGilio (hereinafter "petitioner"). The petition stems from denial by the district court of a motion for a new trial and affirmance of that decision by the Third Circuit. Petitioner's motion was predicated upon evidence that the government failed to correct false testimony given by an FBI agent in open court before the trial jury. It is conceded by the district court and the government that the false testimony materially impacted upon the jury's verdict and indeed controlled it. Stated somewhat differently, the issue as to petitioner's guilt or innocence was determined on the basis of the false testimony. Had the witness testified truthfully, the jury would have had no option other than to acquit petitioner. Indeed, the trial court might well have granted a judgment of acquittal at the conclusion of the goverment's case in the event that the false testimony was not considered. In this context, it is instructive that the judge who decided the motion did not preside at trial. The trial court

clearly would have had a keener perception of the impact of the false testimony on the reliability of the verdict. The trial court had specifically ordered production of materials which would have established the falsity of the testimony. The government falsely denied that any such information existed.

In denying the motion, the district court stated that access to information indicating the falsity of the testimony by the defense negates the government's responsibility to effect a curative correction. The district court's configuration of the law is at odds with what can clearly be termed as rubric. A prosecutor in no circumstance may facilitate consideration of false testimony by a trial jury in its deliberations as to the guilt or innocence of the defendant. This Court must grant certiorari to correct this perversion of our precepts of a just and fair trial.

II.

Introduction

A. Procedural History

An August 6, 1974 United States District Court, District of New Jersey Indictment No. 74-314 was filed. That indictment charged petitioner with : conspiracy in violation of 18 U.S.C.A. Sec. 371 (Count One) and conversion of records of the United States valued in excess of $100.00 in violation of 18 U.S.C.A. Sec. 641 (Count Two). Trial of the offenses was conducted before the Honorable H. Curtis Meanor and a jury in June and July of 1975. On July 30, 1975 petitioner was convicted of both offenses. On September 12, 1975 Judge Meanor imposed a sentence upon petitioner of nine years imprisonment and a $0,000 fine on Count Two and an concurrent term of five years imprisonment on Count One. On appeal to the Third Circuit, petitioner's conviction on count Two was reduced to conversion of property valued at less than $100.00, a misdemeanor. See United States v. DiGilio, 538 F.2d 972 (3 cir. 1976), cert. den. 429 U.S. 1038 (1977). Thereafter, on December 14, 1979 Judge Meanor sentenced petitioner to a term of imprisonment

of nine months and a $1,000 fine on Count Two (conversion) and to a $1,000 fine on Count One (conspiracy).

On March, 12, 1984 petitioner moved for a new trial before the Honorable Dickinson R. Debevoise, U.S.D.J. The Court ordered tht an evidentiary hearing be conducted. Judge Debevoise deneid petitioner's motion that same day. The Third Circuit affirmed the district court. Thereafter, the Third Circuit denied a petition for a rehearing.

b. Factual Background

i.

The 1975 Trial

a. The Alleged Instigation By Petitioner Of Thefts Of Documents Maintained By The Federal Bureau Of Investigation

In March of 1971, George Kuczynski began to offer for sale confidential documents prepared and maintained by the Newark office of the Federal Bureau of Investigation (hereinafter "FBI"). The documents were photostated copies of original materials. Kuczynski at the time that he commenced

marketing FBI documents was romantically involved with a clerical employee of that agency, Irene Klimansky. Prior to trial, Kuczysnki and Klimansky conveniently formalized their relationship into a marriage.

During their courtship, Klimansky was coerced by Kuczynski into stealing the FBI documents for his use. Kuczynski misutilized Klimansky for this nefarious purpose because he had been unsuccessful in his own attempts to burglarize the FBI office. The form of persuasion which motivated Klimansky's ultimate participation was infliction by Kuczysnki of savage beatings upon her.

Klimansky was ordered to purloin specific documents embodying information compiled on petitioner and others. Although the evidence at trial indicated that "the documents were being peddled around town and that others besides [petitioner] had been approached by Kuczynski about purchasing them," it was the government's theory at trial that petitioner instigated Kuczynski's actions. See, United States v.

DiGilio, 538 F.2d 972, 979 (3 Cir. 1976), cert. den. 429 U.S. 1038 (1976). In this context, it is interesting to note that Kuczysnki allegedly maintained an inventory of documents relating to petitioner which he separated into components to proliferate the number of transactions and thereby multiply his opportunities for profit. Simply put, Kuczynski did not provide documents to petitioner as he received them. Kuczynski stockpiled his wares and parceled them out. Petitioner allegedly paid a total of $1,000 to Kuczynski for the various deliveries of documents.

b. The Issue At Trial As To Production Of Evidence Respecting Surveillance Of Petitioner

Kuczynski was the sole witness who testified against petitioner. Kuczynski stated that he met petitioner at the Italian-American Civil Rights League premises (hereinafter "IACRL") on a single occasion, in December of 1971. (Da13). That testimony was urged by the government as providing the necessary nexus between petitioner (as the instigator) and the thefts by Klimansky of the

documents. The testimony was false and a pimary aim of the defense was to demonstrate such. The defense sought to contradict the testimony by establishing that there was surveillance of the IACRL and/or petitioner in December 1971. The surveillance, if proved, would establish that no such meeting involving petitioner and Kuczynski transpired. FBI Special Agent Wayne Comer, who had previously testifed as a witness for the government, was called by petitoner's attorney in an attempt to probe the issue of the availability of surveillance evidence which would contradict Kuczynski.

The testimony was adduced as follows:

> Q: Now, during this period December 1971, which is of some interest because I understand George Kuczynski testified to a meeting with Mr. DiGilio in December of 1971..during this period was the Italian-American Civil Rights Club--If I have the the name right--under observation or investigation?

THE GOVERNMENT: Your, Honor, I object...

THE COURT: I am going to ask this question, Mr. Comer, and I want a yes or no answer...in December 1971, was the Italian-American Civil Rights League in Bayonne under any FBI investigation?

THE WITNESS: I don't know, sir.

Q. [DEFENSE COUNSEL]: Do you know whether in December 1971 John DiGilio was under observation by the FBI?

A: I don't know exactly, no. I was out looking into the —.

Q: Do you know of any report in the FBI, any memorandum, any writing, or any indicatin by any agent that says that John DiGilio was seen in the company of George Kuczynski in December 1971.

A: Not that I know of.

Q: And would you be able to check for us, sir, with the court's

permission, to find out if, in December 1971, in fact, John DiGilio was being watched and therefore the FBI would know who he met with, by observations, and whether this club was being watched, so that we could get some information, perhaps from an FBI agent, as to what was, in fact, seen in December 1971? Could I ask that that be done, Judge?

THE COURT: Could you look that up? Yes or no?

A: I can look through the file and see if there is such.

Q: Do you know or would you agree that the Italian-American Civil Rights League is periodically, or has been periodically under investigation, not only in Newark but in different cities around the country, observations by the FBI, or other agents?

Q: I have no idea.

Thereafter, at the close of the day, the witness was excused with specific instructions from the court as to efforts to be made in search of surveillance evidence. This exchange ensued:

> Q. [DEFENSE COUNSEL]: ...I want to know about the observations by the FBI of John DiGilio and/or the Itailian-American Civil Rights League that has been testified to here...[in December of 1971].
>
> THE COURT: To be precise, you want to know I take it, if the club and/or DiGilio were under surveillance...
>
> * * *
>
> THE COURT: Will you find out the answers to these questions?...Let me know yes or no as to whether the Italian-American Civil Rights Club in Bayonne was under surveillance in December of 1971, and let me know if John DiGilio, the defendant here, one of the

> defendants here, was under surveillance in December 1971.[1]

The following day, argument as to the issue of surveillance evidence resumed. The government offered a stipulation. The stipulation was proffered in this manner.

> THE COURT: What are you prepared to stipulate to? What is Comer going to say?
>
> THE GOVERNMENT: I am prepared to stipulate that there was no surveillance by the FBI at anytime of the Italian-American Civil Rights League.
>
> THE COURT: How about surveillance of DiGilio?
>
> THE GOVERNMENT: There was surveillance of Mr. DiGilio in December of 1971.
>
> THE GOVERNMENT: ...I don't want any further inquiry into the observations and purposes thereof.

---

[1] It bears repeating that the Court was concerned about any surveillance information of which the United States Attorney was aware.

DEFENSE COUNSEL: I don't want to know the purpose, I only want to know whether they made observations and whether, in fact, they saw him at any time with Mr. Kuczynski.

THE GOVERNMENT: That question I will stipulate to, that they never saw Mr. DiGilio with Mr. Kuczynski during the observation...I don't think he's entitled to go any further into the surveillance.

Thereafter, specific examination of Agent Comer as to the surveillance issue resumed. Agent Comer testified:

Q: Now, I asked you if you would check and see whether the -- in or about December of 1971 the Italian-American Civil Rights League that we discussed here was under surveillance?

A: It was not.

Q: It was not under surveillance?

A: It was not under surveillance, sir.

Q: An when I say, "was it under surveillance," was it under surveillance during that period of time, let's say, indcidental but to the surveillance of someone else, like a member, for example, if John doe is a member of the Italian-American Civil rights organization and he goes there frequently and he is under observation and surveillance, and he goes there, he would then be under observation at the club?

A: Correct.

Q: What I'm asking you is not only was the club under observation, but were any observations of the club made during that period of time through the incidental observations of its members or people going there?

A: No.

* * *

Q: So then how do you know that there is no incidental surveillance?

A: There is a file not on the club in Bayonne, unless you would want time to check every possible person that could go there, how -- I don't know who could go there, I can't positively answer your question.

* * *

Q: There is no file that you could go and find out if there was an incidental observation of that club?

A: There is no reference, there is no reference indicating that a surveillance was conducted of anybody else at the club.

ii.

The 1984 New Trial Motion

a. Discovery Of The Documents And The Filing Of The New Motion

In 1983, documents surfaced which established that at the time of trial the FBI was in possession of a surveillance report respecting the IACRL. The report embodied the time period at issue

in the cross-examination of Comer, viz. December of 1971. Certain of the documents contained the numerical code "NK 179-233," which was one of the FBI files at issue within the 1975 trial. Those documents contained the following information:

> On Cover Page E: Will determine ownership of N.Y. license tag 1163-AR, obvserved at a meeting whic took place on 12/7/71, at the Italian-American Civil Rights League, Bayonne, N.J. Subject DI GILIO presided over this meeting.
>
> PHILDELPHIA
>
> AT PHILADELPHIA, PENNSYLVANIA: Will determine ownership of Pa. license tag A95-912 (1971), which was also observed at the meeting mentioned supra, and thereafter conduct appropriate indices, credit and criminal checks.
>
> On numbered page 32: "Italian-American Civil Rights League, 550 Kennedy Boulevard, Bayonne, New Jersey,

Upon inspection of the documents, petitioner filed a motion for a new trial on the ground that the government suppressed exclupatory evidence and failed to correct trial testimony which it knew to be perjurious. In its response to the new trial motion, the government chose to ignore completely the substantial allegations of perjury. The government opted to urge that the document which was the subject of the new trial motion had been part of an exhibit which was available to the defense at trial. Therefore, claimed the government, petitoner was not entitled to relief. The government vigorously opposed any hearing. As "Exhibit A" to its response in opposition to the new trial motion, the government provided an unsigned letter which it claimed was the cover page of its transmittal of a series of trial exhibits to defense counsel. The exhibit was also allegedly attached thereto. Item "G-4" on that list was described as an "FBI 302 dated 12-22-71, File nO. 92-2877-378, Investigative period 10/13/71 throught 11/13/71, Report of Dominick D. Domenico, typed

JPF." The government asserted that this item was identical to its Exhibit G-16 at the trial, a full 35-plus page investigative report.

A hearing was conducted to determine whether an evidentiary hearing was warranted. At this hearing, the government continued to focus the issue upon defense access as opposed to its failure to have corrected clearly perjurious testimony. Responding to the court's comment that "G-16 is not a 302," the government argued that "in parlance, an AUSA doesn't know what a 263 [the labeling given to G-16] is; [a government attorney] is going to refer to any FBI report as 302". And, although it could not be stated with certainty that defense counsel received the document prior to trial, the government nonetheless argued that the trial transcript embodied sufficient indicia of access to justify denial of an evidentiary hearing. (Da51). The government noted that in the upper right hand corner of the document there appeared the initials of the fingerprint analyst, Leroy Walton, who testified at the trial. (Da52). Defense counsel

responded that "the government cannot have it both ways, the government cannot say there was no surveillance and then produce a report and say [the defense] look[ed] at it." (Da53).

Government counsel stated that perhaps the trial prosecutor "made an oversight," perhaps the government counsel "did not know it wasn't true when he offered the sitpulation" (Da47). The court posited, "maybe it was in a pile of documents which escaped their attention." (Da47). In granting a hearing into the availability of the document at the 1975 trial, the court proclaimed that "if it were available before and possibly at trial with opportunity to review, I am not going to grant the motion." (Da58). The Court stated further:

> In my opinion, if the DiDomnico report was available to defendants there would be ample grounds to deny DiGilio's motion for a hearing and a new trial. Even if Special Agent Comer was in error or testified falsely when he stated that there was no FBI surveillance of IACRL§s headquarters in

> December 1971, and even if the Assistant United States Attorneys offer to stipulate the nonexistence of such surveillance compounded such error, grounds for a new trialdo not exist...To resolve tis point, I shall schedule a hearing which will be limited to the question of the extent to which the DiDomenico report was made available to DiGilio's trial counsel prior to and during the trial of the case...DiGilio may call as witnesses only persons who were trial counsel for any of the defendants and their testimony will be limited to matters relevant to the issue of the availability of the DiDomenico report." (Opinion of Judge Debevoise filed March 23, 1984). (Da11-12). (emphasis added).

b. The Evidentiary Hearing

Petitioner's chief trial counsel, Michael Querques, was the first witness. A full copy of G-16 was displayed for his review. The report established

conclusively that the FBI was aware of considerable surveillance of petitioner at the IACRL in December of 1971. Querques could not recall having even seen the document. (Da75). Querques testified that there were particular passages in the document which would have been of importance to him at trial in structuring a defense. He stated:

> ...because we were trying to demonstrate that there was, indeed, a surveillance of this particular club and the people who went in and out of the club during the period of time that Mr. Kuczynski was testifying that he was dealing with Mr. DiGilio...to be in a position to prove that this fellow Kuczynski was not telling the truth to the jury.

Querques further testified that from the material he was reading in that document, it was apprent to him "that there was a great interest in this Italian-American Civil Rights League by the FBI." (Da78). (emphasis added). The contents of the

document resulted in Querques' espousal of the firm opinion that based upon all of that material, he had not seen the particular document prior to April 9, 1984 (Da86, 120).

Querques furter testified that based on his review of the entire document, "[t]here is nothing in this document...to indicate that the surveillance is by anybody other than the FBI." (Da91). Notwithstanding that government counsel sought to characterize certain passages as indicating that whatever surveillance there may have been was not undertaken by the FBI, Querques maintained:

> You could say police department, but you might be in error...I have just a little trouble here. I can't tell if the FBI agent who is writing this is saying all of this information comes from that one informant or whether it comes from somethingthe, himself, did. I can't tell from looking at it.

* * *

> I have to disagree with you. The very first page says, 'Spot checks were conducted on a frequent basis during the Investigating Committee by Special Agents Dominick DiDomenico and David W. Pasonti.

Querques' co-counsel in the representation of petitoner at trial, Lawrence Hochheiser, similarly stated that he did not review the document prior to or at trial. Hochheiser stated:

> ...Based on the document, itself, it would be very difficult to say if I saw it that I would recall it...Having reviewed the record to the extent of my questions and the answers and the conduct of the trial at that time, it certainly seems to me that I did not have this document prior to or during trial.
>
> * * *
>
> Baisically, as I can recall, with the aid of reviewing a portion of the record, et cetera, it seems that what we were trying to establish was that if, in fact, Mr.

> DiGilio was meeting with a witness in a case at a particular place; namely, the Italian-American club, whatever the exact name of it was, that if that place had been under surveillance by the authorities, that those meetings would have been seen, and that if it had been under reasonably constant surveillance by the authorities or if we happened to be fortunate enought to find surveillance on key dates, I suppose, and there was no observation of a meeting, might have claimed to have happened at that time and place by the witness, then it would put the lie to the witness' testimony.
>
> So it seems clear what I was attempting in examining the Special Agent was to establish his surveillance of that location.

The defense next called Samuel DeLuca, Esq., who represented a codefendant at trial. DeLuca testified that it would have been important to his

defense to "know whether the Italian-American Civil Rights League was under surveillance or not during the time in question." (Da141). DeLuca stated further:

> ...[My client] -- the allegation at that time was that [my client] had a gas station directly across the street from the Italian-American Civil Rights League on Kennedy Boulevard. As the testimony evoved, I believe Mr. Kuczynski had indicatedthat [my client] was, if I remember correctly, was the conduit between Kuczynski and Mr. DiGilio. So the surveillance in that area would have been important to me...

DeLuca testifed that he had not reviewed G-16 prior to the date of the evidentiary hering. DeLuca then referred to notes which he made at trial. The notations under Comer's name stated "no evidence of surveillance." (Da142-143).

Following DeLuca's testimony, the govern nent called its first witness, former AUSA William Robertson, the prosecutor at trial. The first

exhibit that the government had Robertson identify was the trial folder he previously prepared in connection with the testimony of Mr. Walton, the fingerprint expert "who we would present as a witness at the trial." (Da159). Included in that folder was a copy of G-16, although Robertson could not remember when during the time of the trial he assembled that folder. (Da160). Robertson was also unable to identify the letter which government counsel alleged transmitted the crucial document to petitioner's trial attorneys. (Da163).

Thereafter, the government introduced into the record a copy of G-16 that it claimed was provided to Querques at trial. Admission of this evidence occurred after each of the government's witnesses had concluded their testimony. (Da191-192). Although its implications could turn the case, this critical piece of evidence was placed on the record in such a way that defense counsel was absolutely

forclosed from authenticating it, or from establishing a chain of custody, or even from using it to refresh Querques' or Hichheiser's memory.

The court denied petitioner's motion on the basis of a finding that the report had been available to petitioner's counsel at trial. The court stated:

> I think the evidence is overwhelming that these exhibits to which reference concerning surveillance is contained was made available to the defendants...I see absolutely no basis for this motion now that the facts have been developed and it will be denied.

The opinion makes no reference to the government's failure to correct Comer's false and misleading testimony. We stress that the district court stated that an FBI agent can testify falsely with impunity merely because the defense may have had access to impeaching materials. The Third Circuit affirmed.

This petition follows.

Reasons For Granting The Writ

Point I

Certorari Must Be Granted To Enforce The Rule Of Law That A Prosecutor Must Correct False Testimony Uttered by His Witness Without Regard To Whether The Defense Had Access To Materials Which Establish The Perjurious Nature Of The Testimony

The district court and Third Circuit did not perceive the compelling and irrefutable merit of petitioner's new trial motion and erred in denying it. Specifically, those courts failed to perceive that the government has an absolute duty to correct any false and misleading testimony of its witness. The principle of constitutional law of is of such high regard that a prosecutor's duty to correct false testimony extends even to circumstances where "defense counsel, in a knowing and intelligent decision on trial strategy, refuses to exploit a witness' perjured testimony." Ross v. Heyne, 483 F.Supp. 798, 801 (N.D.Ind. 1980), aff'd 638 F.2d 979 (7 Cir. 1980) United States v. Meyers,

484 F.2d 113, 116 (3 Cir. 1973); purports to establish a different rule in the Third Circuit. That opinion permits deception of a court and jury where the defense had access to materials establishing the perjury That opinion is irrational and is inconsistent with this Court's opinin in **Giglio v. United States, 405 U.S. 150 (1972).**

The district court and Third Circuit committed unassaillable error in ruling that evidence of uncorrected false testimony is not presently a basis for relief, because defense counsel may have had access to materials demonstrating the falsity. The prosecutor's duty extended beyond securing a conviction. He was required to pursue fair and honorable means. **Berger v. United States, 295 U.s. 78 (1935).** Purposeful and/or inadvertent misleading of the court and trial jury by the the United States attorney is per se violative of the basic due process tenets of our system where the deception affects the

outcome of the trial. Any contrary rule is offensive to notices of due process. No party within a trial is permitted to deceive the jury.

The false testimony related to the existence of particular surveillance evidence. Such evidence, which was in the possession of the government at trial, would have demonstrated that petitioner did not meet with Kucynski, who engineered the theft of FBI documents, as that individual claimed. This alleged meeting was the crux of the government's theory of petitioner's culpability as being that of a planner and conspirator.

The FBI case agent falsely testified before the trial jury that no such surveillance evidence existed within files maintained by the agency.[2] The

---

2 The United States Attorney reinforced this falsehood or redirect-examination.

> THE GOVERNMENT: Now, the Italian-American Civil Rights League, that has never been under surveillance by the FBI and there is no file on it, is there?
>
> A: That is correct:

Documents are appended to this petition which demonstrate that the FBI surveilled the Italian-American Civil Rights League on September 23, 1971. These documents are FBI reports.

false testimony of the agent acted to corroborate the perjurious testimony previously provided by Kucynski respecting a December meeting with petitioner. Thus, the jury was misled into finding that petitioner met with Kucynski to plan Kucynski's efforts to steal FBI documents on the basis of evidence which the government knew to be contradicted by information in its possession. The district court had an absolute duty to grant petitioner a new trial wherein the jury is presented with a truthful and accurate assessment of the evidence. In contrast, that court was not offended to any degree by the fact that the FBI agent testified falsely. To the extent that **United States v. Meyers, supra,** is supportive of this lack of concern, the opinion therein is contrary to the constitution.

i.

A Prosecutor May Not Suppress Material Exculpatory Evidence Nor Introduce or Elicit Testimony Known To Be

False Nor Allow False Testimony To Stand Uncorrected

A prosecutor is obliged to disclose pertinent material evidence favorable to the defense. This principle applies not only to matters of substance, but to matters relating to the credibility of government witnesses. **United States v. Butler, 567 F.2d 885, 888 (9 Cir.1978). Cf. Giglio v. United States, 405 U.S. 150, 154 (1972).** Even where the prosecutor's conduct could be explained by a lack of knowledge, he would still be responsible for the consequences of the non-disclosure. **United States v. Butler, supra at 889; United States v. Cravero, 545 F.2d 406, 420 (5 cir. 1977). Cf. United States v. White, 724 F.2d 714, 716-717 (8 Cir. 1977).** Similarly, due process is violated when the prosecutor, although not soliciting false evidence from a government witness, allows it to stand uncorrected when it appears. The prosecutor has an absolute duty to preserve the integrity of the trial process. See, **United States v. Harrison, 716 F.2d 1050, 1051 (4 Cir. 1983).** As in the context of

non-disclosed favorable evidence, the fact that the false testimony goes only to the credibility of the witness does not weaken this rule. United States v. Sanfilippo, 564 F.2d 176, 178 (5 Cir. 1977), appeal after remand 581 F.2d 1152 (5 Cir. 1978). Cf. Napue v. Illinois, 360 U.S. 264 (1959) (The State may not use false testimony to obtain a conviction); Campbell v. Reed, 594 F.2d 4, 7 (4 cir. 1979) (Presentation of known false evidence cannot be reconciled with rudimentary demands of justice); United States v. Glover, 588 F.2d 876, 879 (2 Cir. 1978) (Even if government was not aware of inaccuracies until after the testimony was given, it would still have a duty to subsequently correct the testimony). See, United States v. Adamo, 742 F.2d 927 (6 cir. 1984).

In circumstances where it is clear that the government's witness has testified falsely and the prosecutor has failed to correct the testimony, the sole issue is whether the uncorrected statement affected the outcome of the trial. United States v. Agurs, 472 U.S. 97, 104-106 (1976); Monroe v.

Blackburn, 607 F.2d 148, 151-152 (5 Cir. 1979); Ostrer v. United States, 577 F.2d 782, 786 (2 Cir. 1978), cert. den. 439 U.S. 1115 (1979). Cf. Maddox v. Montgomery, 718 f.2d 1033, 1035-1036 (11 Cir. 1983)

ii.

The District Court and the Third Circuit Erred In Ruling That Consideration By The Jury Of False Testimony Did Not In Itself Form A Basis For The Relief Sought Herein

In Giglio v. United States, supra, the United States Supreme Court firmly and unequivocally established guidelines respecting deception of a court and jurors by virtue of admission of false testimony. The district court herein ruled that the prosecutor was relieved of the responsibility to correct false testimony because defense counsel may have had access to documents establishing the falsity of the testimony. The opinion of the district court is patently incorrect. The Giglio Court stated:

> [This] court [has] made clear that...deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice...the same result obtained when the [prosecutor], although not soliciting false evidence, allows it to go uncorrected when it appears...A new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. [405 U.S. supra at 153-154]

Application of the tenets of Giglio to the instant matter mandates a new trial. False testimony was adduced below which clearly affected, if not controlled, the judgment of the jury. The false testimony substituted for reliable evidence of petitioner's culpability. The standard applied by the district court, viz. that defense access nullifies the prosecutor's duty to correct, is specifically contrary to the holding in Giglio.[3] The grudging desire of the

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[3] A motion for rehearing was filed to facilitate a statement by the Court as to the law concerning failure to correct false

government and court to sustain an infirm conviction in inconsistent with the principles that "deception of a court and jury is incompatible with the rudimentary demands of justice." **Giglio, supra at 153-154.** See, **Perkins v. LeFeVre, 691 F.2d 616, 618 (2 Cir. 1982)** (Where conviction has been obtained using perjured testimony and prosecution knew or should have known of perjury, conviction must be set aside if there was any reasonable likelihood that the false testimony could have affected the judgment of the jury).

Defense access to impeaching materials has little or no significance since the highest value is the the reliability of the truth-determining process. **United States v. Meyers, supra,** which requires that a party seeking a new trial be taken by surprise when false testimony was given and was unable to meet it after

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testimony. The Court did not take advantage of that opportunity. The court focused exclusively upon access and made no statement respecting the duty to correct. We note that the prosecutor solicited the false testimony at issue herein.

trial, cannot be the law in any circuit. Such a rule ignores the prosecutor's role as a guardian of the integrity of the process.

The opinion in Ross v. Heyne, supra at 801 is particularly probative. The Court Stated:

> The Court is faced with something more than a withholding of evidence problem, as found in Napue v. Illinois and Giglio v. United States. It must be determined whether the obvious duty of the prosecutor under Napue and Giglio, to inform the jury of any evidence that would affect the credibility of the witness, extends to a case where defense counsel was aware, well in advance of trial, of the existence of such evidence but refused to use it. Where defense counsel, in a knowing and intelligent decision on trial strategy, refuses to exploit a witness' perjured testimony, does due process require the prosecution to do so? In other words, does the duty of the prosecutor to inform the jury of te existence of a plea agreement require him to encroach upon a

defendant's strategic and knowing choice not to offer evidence of the agreement? To these last two inquiries, this Court must answer yes.

* * *

Were this a case of the prosecutor withholding evidence from the jury and the defendant, this Court would not hesitate in its granting of the writ. However, where defense counsel, with the knowledge of a plea agreement, chooses not to exploit the perjury of a state's witness for strategic purposes, the mandate of **Giglio** and **Napue** appears less than clear.

In this case, the prosecutor had informed the defendant, through her counsel well in advance of trial,of the fact that Spencer had made a plea agreement and would testify for the State. Neither the prosecutor nor the defense counsel exploited the fact of the perjury. This factor distinguishes the case at bar from **Napue, Giglio** and their progeny and lends some

merit to the argument that defense counsel's failure to pursue the obvious perjured testimony was a knowing and intelligent decision of trial strategy and, as such, a waiver of any due process violation. This argument poses the question whether a defendant can have it both ways at trial, withholding evidence of perjury gambling on acquittal without presenting it, and then later, after the gambit fails, present such withheld evidence at a subsequent proceeding under 28 U.S.C. § 2254. Other courts have not been sympathetic to this tactic and have refused to consider a due process violation filed by a convicted defendant where he made the conscious choice to conceal evidence of perjury at trial. Jacobanis v. United States, 256 F.2d 485 (1st Cir. 1958).

Although this "waiver theory" has some arguable validity, this Court cannot ignore the clear holdings in Napue and Giglio. Where the prosecutor's case

depends substantially upon the testimony of the perjured witness, the credibility of that witness is an important issue and "evidence of any undertaking or agreement as to a future prosecution would be relevant to his credibility and the jury...[is] entitled to know of it." Giglio, 405 U.s. at 154-155, 92 S.Ct. at 766.

An examination of the state records makes it initially apparent that petitioner's conviction could not have been obtained without the testimony of Spencer. Spencer was the only witness to testify that petitioner struck the victim with the bat. Thus, the one necessary element for obtaining a conviction on the inflicting chrge was proved solely by this witness. Secondly, there is no doubt that the witness, as well as the defendant-petitioner's counsel knew of the plea agreement. It is also doubtless that the false testimony concerning the plea agreement could have reasonably affected the judgment of the

jury. Thus, the two part of test of Giglio has been met in this case. See, United States v. Bynum, 567 F.2d 1167 (1st Cir. 1978).

The jury was entitled to know of the plea agreement in this case. Keeping information from the jury that would prove the existence of the agreement was aviolation of due process. The prosecutor had the duty to present such information to the jury. Moreover, that duty is not met by informing only the defendant and counsel of the agreement. Despite the defendant's tactical maneuvering with the perjuring witness, the prosecutor must inform the jury of the plea agreement. By remaining silent, the prosecutor ignores his duty under the due process clause of the Fourteenth Amendment.

We believe that the rationale underpinning the decision in **Ross v. Heyne, supra,** must be iterated as being the law of this land. This Court clearly stated in **Agurs** that "corruption of the truth-seeking function of the trial process [will be remedied] if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S., **supra** at 2397. **Cf. United States, ex rel. Marzeno v. Gengler,** 574 F.2d 730, 736 (3 Cir. 1978). In the instant matter, false testimony proferred by the government resulted in petitioner's conviction. This Court must grant certiorari and remedy this travesty of justice.

The district court and Third Circuit demonstrated no concern whatsoever for corruption of the process. The district court viewed information establishing that the agent testified falsely. No effort was made to explain how highly capable defense counsel failed to use inforamtin which would have won their respective cases. The district court found evidence of access and terminated its analysis at that point. This Court must demonstrate a greater degree of scrutiny.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant certiorari.

Respectfully submitted,

ALAN DEXTER BOWMAN, P.A.

ATTORNEY FOR PETITIONER

DATED: April 1, 1985

APPENDIX

APPENDIX A
ORDER FILED APRIL 13, 1984

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Criminal No. 74-314
v.	:	
JOHN DIGILIO,	:	Hon. Dickinson R. Debevoise,
Defendant	:	United States District Judge

ORDER

This matter having come before this Court on a motion by the defendant DiGilio (Alan M. Pollack, Esq., appearing) for an Order granting a new trial in the above-captioned matter and the United States of America through the United States Attorney for the District of New Jersey W. Hunt Dumont (U.S. Department of Justice Attorney Warren S. Robins, appearing) having opposed said motion and the Court having reviewed the papers and heard the arguments of both parties and the Court having granted a hearing to determine whether

certain materials were made available to the defense prior to and during the trial of the above-captioned matter and the Court having held a full and plenary hearing on this issue on April 9, 1984,

IT IS on this 12th day of April 1984,

ORDERED and ADJUDGED that the defendant DiGilio's motion for a new trial is denied for the reasons set forth in the Court's ruling of April 9, 1984.

s/DICKINSON R. DEBEVOISE
HON. DICKINSON R. DEBEVOISE
UNITED STATES DISTRICT JUDGE

At: Newark, New Jersey

APPENDIX B
ORDER DENYING MOTION FOR REHEARING
FILED APRIL 19, 1984
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 74-314

UNITED STATES OF AMERICA, :

Plaintiff, : ORDER DENYING MOTION FOR REHEARING

V. :

JOHN DIGILIO, :

Defendant. :

The following events having taken place:

1. Defendant John DiGilio moved for a new trial on the grounds that the government failed to disclose to the defendant during the course of the trial that the FBI had conducted a surveillance of certain offices.

2. In accordance with an opinion filed in this case the court scheduled and conducted an evidentiary hearing to determine whether defendant had available to him at or prior to the trial certain documents which disclosed that a surveillance

had been conducted of said premises.

3. The evidence at the hearing disclosed that the surveillance referred to in the documents was not conducted by the FBI as asserted by defendant but was conducted by other authorities and the evidence establishes conclusively that defendant John DiGilio, his attorney and the attorneys for the other defendants had available to them prior to and at the trial the document disclosing that the non-FBI surveillance had been conducted.

4. In a bench ruling the court determined that there was no basis for defendant's motion for a new trial and subsequently entered an order denying the motion in all respects.

5. Defendant now moves for a rehearing, graciously stating "It is sufficient for our purposes for the court to file a supplemental letter opinion."

There being no basis for a motion for rehearing,

IT IS this 19th day of April 1984

O R D E R E D:

1. Defendant's motion for a rehearing is denied.

2. Should defendant or his attorneys file any further motions in this action which prove to be baseless, both the defendant and the attorneys will be required to show cause why attorneys fees and costs should not be assessed against both the defendant and the attorneys.

s/DICKINSON R. DEBEVOISE
DICKINSON R. DEBEVOISE
U.S.D.J.

APPENDIX C
OPINION FILED MARCH 23, 1984

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 71-314

UNITED STATES OF AMERICA, :

Plaintiff, :

V. : OPINION

JOHN DIGILIO, :

Defendant. :

Appearances:

W. Hunt Dumont, Esq.
United States Attorney
BY: Warren S. Robins, Esq.
Special Attorney
U.S. Department of Justice
970 Broad Street
Newark, NJ 07102

Alan M. Pollack, Esq.
Attorney for Defendant
501 Madison Avenue
New York, NY 10022-5696

DEBEVOISE, District Judge.

There is before the court a motion of defendant John DiGilio for a hearing and for a new trial based on newly discovered

evidence. Disposition of the motion requires a brief review of earlier proceedings in the case.

On July 30, 1975 John DiGilio and two codefendants were found guilty of conspiracy in violation of *18 U.S.C. §§371* and *641*, respectively. DiGilio was originally sentenced to nine years' imprisonment on the substantive count and to a concurrent five year term of imprisonment on the conspiracy count. However, the Court of Appeals for the Third Circuit reduced DiGilio's conviction to a misdemeanor and remanded the case for resentencing. See, *United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977)*. After extensive hearings on DiGilio's competency to be sentenced, DiGilio was resentenced to nine months' imprisonment and a $1,000 fine on the substantive count and to a five year term of probation on the

conspiracy count. The resentencing was appealed and was affirmed in 1980. DiGilio is currently serving his term of probation which began in August 1981.

On July 26, 1982 DiGilio filed a second motion seeking a new trial based on newly discovered evidence pursuant to *Rule 33* of the Federal Rules of Criminal Procedure. In this motion DiGilio primarily contended that information, allegedly recently found on the back of Italian-American Civil Rights League (IACRL) membership cards, established that FBI Special Agent Wayne Comer testified falsely about a 1974 FBI surveillance. After papers were filed but prior to oral argument, this motion was voluntarily withdrawn by DiGilio.

On January 19, 1984 the present motion was filed.

The government had charged that at the instigation of DiGilio government wit-

ness George Kuczynski and his girlfriend Irene Klimansky, who was then a clerk-typist at the Newark FBI office, photocopied information from confidential FBI files concerning DiGilio. The jury concluded by its verdict that the government had proved these charges beyond a reasonable doubt.

Kuczynski's testimony was, of course, of critical importance. According to that testimony Kuczynski's only direct contact with DiGilio in connection with the scheme occurred at the IACRL headquarters in Bayonne sometime in December of 1971.

Another government witness was FBI Special Agent Wayne P. Comer. During Comer's cross-examination defense counsel asked him whether the FBI had the IACRL headquarters under suveillance in December 1971. At defense counsel's request Special Agent Comer checked the FBI records and then testified that the

headquarters had not been under surveillance at that time and no observations were made of people coming and going. In addition the Assistant United States Attorney trying the case stated that "I'm prepared to stipulate that there was no surveillance by the FBI at any time of IACRL..." Had the headquarters been under surveillance in December 1971 and were it reported that either DiGilio or Kuczynski had not been observed there, some doubt, at least, might have been cast upon Kuczynski's statement that he met DiGilio at the IACRL headquarters during that month.

After a number of false starts, and after considerable prodding by the court, counsel for DiGilio has finally specified what it is that he relies upon to establish that the FBI had the IACRL headquarters under surveillance in December 1971. Attached to counsel's February 21,

1984 affirmation are six typewritten sheets designated "E Cover Page" and 11, 12, 13, 32 and 33. The numbered pages contain telephone numbers, names and addresses of individuals and business concerns and several references to "Italian-American Civil Rights League." The "E Cover Page" contains a list of telephone numbers and two entries, one of which reads "3. Will determine ownership of N.Y. license tag 1163-AR, observed at a meeting which took place on 12/7/71, at the Italian-American Civil Rights League, Bayonne; N.J. Subject DiGilio presided over this meeting."

These pages are accompanied by an affidavit of Anthony F. Gallagher, who has a long association with the post trial motions in the DiGilio case which need not be recounted here. Referring to the six pages produced by DiGilio's counsel, Gallagher states, "I personally extracted

these six pages, mentioned *supra*, and other materials from a clear plastic bag stored in the right hand side of a basement closet under a stairwell in Nicholas Furina's home on West 25th Street, Bayonne, N.J. ...My best recollection is that it was in a period October/November 1982."

The government asserts that the six pages are a part of an investigative report prepared by FBI Special Agent Dominick DiDomenico dated December 22, 1971 and covering the period October 13, 1971 through December 13, 1971. A copy of the report was exhibited at the March 12, 1984 hearing on DiGilio's motion. The report had been filed under two investigations relating to DiGilio, namely, No. 179-233 (loansharking) and No. 92-2877 (anti-racketeering).

It is the government's contention that on July 16, 1975 the government sent

a letter to Michael Querques, Esq., then counsel for DiGilio, which was accompanied by a full copy of the report. The government further contends, and a transcript of the file seems to confirm, that the report was available and referred to at the trial.

In my opinion, if the DiDomenico report was available to defendants there would be ample grounds to deny DiGilio's motion for a hearing and a new trial. Even if Special Agent Comer was in error or testified falsely when he stated that there was no FBI surveillance of IACRL's headquarters in December 1971, and even if the Assistant United States Attorney's offer to stipulate the nonexistence of such surveillance compounded such error, grounds for a new trial do not exist. With DiDomenico's report available to them defense counsel cannot claim that they were taken by surprise when the allegedly

false testimony was given or that they were unable to meet it or did not know of its falsity until after trial. *United States v. Meyers, 484 F.2d 113, 116 (3d Cir. 1971).*

However, DiGilio's present attorney has filed an affirmation of DiGilio's trial attorney which states that he did not receive a copy of the DiDomenico report prior to trial. I consider it significant that in his affirmation trial counsel did not deny having the report during the trial. Nevertheless, present counsel for DiGilio argues that trial counsel either did not have the report at trial or else did not have effective use of the report at the trial.

To resolve this point I shall schedule a hearing which will be limited to the question of the extent to which the DiDomenico report was made available to DiGilio's trial counsel prior to and

during the trial of the case of *United States v. DiGilio, Cr. No. 74-314*. DiGilio may call as witnesses only persons who were trial counsel for any of the defendants and their testimony will be limited to matters relevant to the issue of the availability of the DiDomenico report. The government may call as witnesses only persons having knowledge of facts relevant to that single issue.

The date of the hearing will be April 9, 1984, commencing at 2:00 p.m.

s/DICKINSON R. DEBEVOISE
DICKINSON R. DEBEVOISE
U.S.D.J.

DATED: MARCH 23, 1984

APPENDIX D
JUDGMENT ORDER FILED DECEMBER 5, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5308

THE UNITED STATES

vs.

JOHN DIGILIO
JOHN GRILLO
HARRY LUPO
PETER SZWANDRAK
GEORGE KUCZYNSKI
IRENE (KILMANSKY) KUCZYNSKI

JOHN DIGILIO
Appellant

Appeal from the
United States District Court
for the District of New Jersey
(D.C. Crim. No. 74-0314)
District Judge: Honorable Dickinson R. Debevoise

Submitted Under Third Circuit Rule 12(6)
December 4, 1984
Before: ALDISERT, Chief Judge, BECKER, Circuit Judge, and CAHN, District Judge.*

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* Honorable Edward N. Cahan of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After considering the contentions raised by appellant, as expressly stated in the appellant's brief, i.e., "The court erred in denying appellant's motion for a new trial notwithstanding clear evidence in the record establishing that the testimony of FBI Agent Comer was false and misled the jury with respect to the critical issue as to whether appellant met with Kucynski to instigate theft of FBI documents: reversible error (i) a prosecutor may not suppress material exculpatory evidence nor introduce or elicit testimony known to be false nor allow false testimony to stand uncorrected; and (ii) the district court erred in ruling that consideration by the jury of false testimony did not form a basis for the relief sought here;" it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/ALDISERT
CHIEF JUDGE

Attest:

s/M. Elizabeth Ferguson
Chief Deputy Clerk

DATED December 5, 1984

Certified as a true copy and issued in lieu of a formal mandate on January 10, 1985.

Test: M. Elizabeth Ferguson

Chief Deputy Clerk; United States Court of Appeals for the Third Circuit

APPENDIX E
SUR PETITION FOR REHEARING, FILED
JANUARY 2, 1985
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5308

THE UNITED STATES

vs.

JOHN DIGILIO
JOHN GRILLO
HARRY LUPO
PETER SZWANDRAK
GEORGE KUCZYNSKI
IRENE (KILMANSKY) KUCZYNSKI

JOHN DIGILIO, Appellant
(D.N.J. Crim. No. 74-0314)

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, and SEITZ, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges, and CAHN, District Judge.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who

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* Honorable Edward N. Cahn, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/ALDISERT
Chief Judge

Judge Gibbons did not participate in the consideration of this matter.

APPENDIX F
SPOT CHECKS

NK 179-233

SPOT CHECKS

On September 23, 1971, the following observations made by the Special Agents of the FBI at the Italian-American Liberties Union (IACLU) at 550 Kennedy Boulevard, Bayonne, New Jersey:

10:10 AM The following vehicles were observed parked in front of the office:

PCZ-183 JOHN LA SCALA, also known as (aka) Pepe

MNR-612 SONIA CONTE
1185 Kennedy Boulevard,
Bayonne, New Jersey
1968 blue Pontiac

MMD-439 CHARLES M. ARANCIO
398 Danforth Avenue
Jersey City, New Jersey
1968 blue Pontiac

JIJ-252 VINCENT S. RUSSOTTO
122 West 21st Street,
Bayonne, New Jersey
1969 brown and gold
buick

RXC-319 ROBERT F. BRANDON
370 Kennedy Boulevard,
Bayonne, New Jersey
1963 turquoise Pontiac
Convertible

10:30AM PEPE LA SCALA was observed standing outside of the office talking with about six other white males. They then entered the above vehicles and departed.

11:00AM PEPE was observed talking with two other white males at the Dun Rite Car Wash, 62 21st Street, Bayonne, New Jersey, telephone number 436-9529. One of the unknown males was observed passing money to PEPE.

212-588-7900
212-679-0300
212-861-6423
212-535-3000
212-477-2326
212-645-2405
212-331-1874
212-236-2288
212-372-9815
212-442-7100
212-372-9176
212-233-5390
212-588-1900
212-266-6370
212-448-5773
212-344-8500
212-925-1600
212-925-2300
212-925-1300
212-349-2450
212-585-7576

914-331-0917
212-964-3520
212-987-6906
212-981-1222
212-351-1437
914-769-6441
914-331-9660
914-664-8663
516-433-3580
516-724-5244

3. Will determine ownership of N.Y. license tag 1163-AR, observed at a meeting which took place on 12/7/71, at the Italian-American Civil Rights League, Bayonne, New Jersey. Subject DI GILIO presided over this meeting.

PHILADELPHIA

AT PHILADELPHIA, PENNSYLVANIA: Will determine ownership of Pa. license tag A95-912 (1971), which was also observed at the meeting mentioned supra, and thereafter conduce appropriate indices, credit and criminal checks.

NEWARK

PCT-684 JOSEPH J. BROCCO
448 Palisade Ave.
Jersey City, New Jersey
1968 Chyrsler, two-door,
black

UES-814 Hotsy Totsy Pub, Inc.
1725 Kennedy Boulevard,
Jersey City, New Jersey
1971 Chevrolet,
two-door, Tan

MXF-328 DONALD J. CARSON
912 Florida Drive
Perth Amboy, New Jersey
1970 Cadillac, two-door,
blue

Italian-American Civil Rights League
550 Kennedy Boulevard
Bayonne, New Jersey

PCZ-183 JOHN LA SCALA
28 East 33rd Street,
Bayonne, New Jersey
1969 Oldsmobile
Toronado, Brown

MNR-612 SONIA CONTE
1185 Kennedy Boulevard,
Bayonne, New Jersey
1968 Pontiac, blue

NMD-439 CHARLES M. ARANCIO
398 Danforth Ave.
Jersey City, New Jersey
1968 Pontiac
Convertible, blue

JIJ-252 VINCENT S. RUSSOTTO
122 West 21st Street,
Bayonne, New Jersey
1969 Buick, gold
and brown

RXC-319 ROBERT F. BRANDON
370 Kennedy Boulevard,
Bayonne, New Jersey
1963 Pontiac
convertible, Turquoise

PCG-424 FRANK LORE
117 West 8th Street,
Bayonne, New Jersey
1969 Lincoln, black

PNF-226 JOHN M. GAETA
98 West 43rd Street,
Bayonne, New Jersey
1969 Lincoln Continental
green

HCP-152 GIORGIO BURGAGNI
5-7 Rutgers Ave.
Jersey City, New Jersey
1970 Oldsmobile,
four-door, gold

EMT-449 SANFORD PARNIS
20 Monaghan Road
Edison, New Jersey
1964 Mercury, gray

SRC-952 GALE T. SZEWCZYK
112 West 4th Street
Bayonne, New Jersey
1968 Oldsmobile,
two-door, gold and black

VBL-589 THOMAS FARRELL
8 Avenue C
Bayonne, New Jersey
1962 Chyrsler

LUB-384 JAMES TRAINOR
1720 Kennedy Boulevard
Jersey City, New Jersey
1967 Chevrolet, blue

Italian-American Civil Rights League

212-486-9415	Italian-American Civil Rights League, Inc. 635 Madison Ave. New York City
212-431-6863	Resource Sales Corp. 176 6th Ave. New York City
516-593-1825	ARTHUR RIMER 2 Fawler Ave. Lynbrook, New York
201-787-8613	J. RICHMOND 9 Sunset Place Port Monmouth, New Jersey
201-943-7967	G.C. FRICKS 52 Franklin Ave. Fairview, New Jersey
201-324-0303	DONALD J. CARSON 912 Florida Grove Road, Perth Amboy, New Jersey
201-759-7838	Donna Motor Sales 370 Washington Street, Belleville, New Jersey

201-751-1596	J.A. MARRA 74 Heckel Street Belleville, New Jersey
201-687-0800	Kroll Motors, Inc. 671 Broadway Long Branch, New Jersey
201-222-9200	Gordon Bass and Company
201-744-0700	Claremont Cadillac 1 Greenwood Ave. Montclair, New Jersey

Supreme Court, U.S.
FILED
JUL 18 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1866

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN DI GILIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Due Process Clause entitles a criminal defendant to a new trial upon allegations, nine years after conviction, that a government witness's testimony was inconsistent with other government evidence disclosed to the defendant at trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1866

JOHN DI GILIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals is reported at 755 F.2d 924 (Table). The order of the district court (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment order of the court of appeals (Pet. App. 16a-18a) was entered on December 5, 1984. A petition for rehearing was denied on January 2, 1985 (Pet. App. 19a-20a). On March 5, 1985, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including April 2, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1975, following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one felony count of conversion of government

records, in violation of 18 U.S.C. 641, and one felony count of conspiracy to defraud the United States government, in violation of 18 U.S.C. 371. Petitioner was sentenced to nine years' imprisonment and a fine of $10,000 on the conversion count and to a concurrent term of five years' imprisonment on the conspiracy count (Pet. App. 7a). On appeal, the Third Circuit reduced the convictions to misdemeanor violations of the same statutes. 538 F.2d 972, 978-981 (1976), cert. denied, 429 U.S. 1038 (1977). In 1979, following extensive hearings on petitioner's competency to stand trial, the district court sentenced petitioner to nine months' imprisonment for the conversion offense and five years' probation for the conspiracy offense. The court also assessed a fine of $2,000. Pet. App. 7a.

In 1984, five years after his resentencing, petitioner claimed discovery of new evidence demonstrating false testimony by a government witness. He asked the district court to vacate the convictions and order a new trial.[1] The district court conducted an evidentiary hearing and subsequently denied the request (Pet. App. 1a-2a, 3a-5a). The court of appeals affirmed without opinion (*id.* at 16a-18a).

1. Petitioner's convictions were based on his purchase of stolen government documents describing an FBI investigation of his suspected criminal activities. Petitioner used intermediaries to purchase the documents from George Kuczynski. Kuczynski obtained the documents from Irene Klimansky, a clerk-typist at the FBI, who photocopied them from originals in FBI files. 538 F.2d at 976.

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[1]Although petitioner described the action as a motion for a new trial, it was not based upon Fed. R. Crim. P. 33—indeed, if it were a Rule 33 motion, it would have been time barred. Petitioner had filed a new trial motion, and appealed the denial of that motion, in 1980, and he subsequently filed two other new trial motions in July 1982 and August 1983. His present motion is actually a collateral attack on his conviction seeking coram nobis relief.

Kuczynski testified at trial that he and petitioner discussed the purchases during a meeting at the Italian-American Civil Rights League (the League) (DA 13).[2] Defense counsel later examined FBI Agent Wayne Comer to determine whether the FBI had observed that meeting. Defense counsel asked Comer whether the League was under FBI surveillance and Comer responded that he did not know (SA 25-26; DA 14-15). The defense then asked him to check FBI surveillance files to determine whether "DiGilio was being watched" (SA 26; DA 15). Following Comer's examination of the FBI files, the government prosecutor offered to stipulate that there was no surveillance of the League by the FBI at any time, that there was surveillance of petitioner in December 1971, and that there was no sighting of petitioner with Kuczynski during the period of surveillance (DA 19-22). Petitioner rejected the stipulation. Those facts were then elicited through further examination of Comer (SA 37-43; DA 23-28). At the close of the trial, the jury found petitioner guilty.

2. On January 19, 1984, petitioner moved to vacate his conviction on the ground that previously undisclosed evidence exonerated him. Specifically, petitioner claimed that a recently obtained FBI report, in the prosecution's possession at the time of trial, indicated that the League had been under FBI surveillance at the time of the meeting between petitioner and Kuczynski. According to petitioner, this report indicated that Agent Comer had committed perjury and also proved petitioner's innocence.

The district court, concerned by the allegations of government misconduct, scheduled an evidentiary hearing to determine whether the government had withheld evidence from petitioner (Pet. App. 6a-15a). The court, relying

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[2] "DA" refers to petitioner's court of appeals appendix. "SA" refers to the government's supplemental court of appeals appendix.

on *United States* v. *Meyers*, 484 F.2d 113, 116 (3d Cir. 1973), stated that "if the [evidence] was available to [petitioner,] there would be ample grounds to deny [petitioner's] motion for a * * * new trial" (Pet. App. 13a-14a).

At the hearing, testimony revealed that the "newly discovered evidence" was actually part of a government trial exhibit marked "G-16" (DA 175). The exhibit, known as the "DiDomenico Report" was one of the confidential FBI documents that the government alleged petitioner had purchased (DA 181-184, 189-191). The report, though not admitted into evidence, was used at trial (see SA 11-13). Testimony at the hearing indicated that petitioner and the defense attorneys had reviewed the report. Indeed, petitioner's fingerprints (DA 187-188) and the notations of a co-defendant's attorney (DA 184) were found on copies of the report that had been supplied to the defense and returned to the government in the course of the trial (DA 191-192). Additionally, testimony at the hearing established that the relevant portions of the report described surveillance, not by the FBI, but by other investigators (DA 175).

At the conclusion of the hearing, the district court stated that "the evidence is overwhelming that [the DiDomenico Report] was made available to the defendants" (DA 193); it subsequently entered an order denying petitioner's motion for a new trial (Pet. App. 1a-2a). Upon motion for rehearing, the court stated further that "the evidence establishes conclusively that defendant John DiGilio, his attorney and the attorneys for the other defendants had available to them prior to and at the trial the document disclosing that non-FBI surveillance had been conducted" (Pet. App. 4a).[3]

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[3]The court added, "Should defendant or his attorneys file any further motions in this action which prove to be baseless, both the defendant and the attorneys will be required to show cause why attorneys fees and costs should not be assessed against both the defendant and the attorneys" (Pet. App. 5a).

Petitioner appealed, contending that the district court erred in ruling that he was not entitled to a new trial. He maintained that the Due Process Clause entitled him to relief, despite his access at trial to what he labeled "newly discovered evidence," because the evidence indicated that a government witness had testified falsely. The court of appeals affirmed the district court order and denied rehearing without opinion (Pet. App. 16a-20a).

ARGUMENT

Petitioner sought to reopen a nine-year-old conviction on due process grounds, alleging that the government withheld exculpatory evidence at trial. The district court, in response, held an evidentiary hearing that conclusively demonstrated that the government had, in fact, seasonably supplied petitioner with the alleged "newly discovered evidence." Apparently abandoning his contention that the evidence was unavailable to him, petitioner now asserts that the district court erred in refusing to give further consideration to his request, claiming that the evidence establishes perjury by a government witness. The record reveals, however, that petitioner's perjury contentions are patently meritless. In all events, the court of appeals' refusal to reopen the conviction is consistent with the decisions of this Court, does not create a conflict among the circuits, and does not warrant this Court's review.

1. Petitioner bases his request for review on the assertion that a government witness testified falsely at trial (Pet. i, 3, 4, 9, 28, 29-44). Petitioner cites excerpts from Agent Comer's trial testimony indicating, in sum, that the agent was unaware of FBI surveillance of the League (Pet. 10-13) and that he later discovered no record of surveillance upon checking FBI files (*id.* at 13-16). Petitioner then points to what he purported was "new evidence"—the DiDomenico Report, produced by the government at trial, indicating possible non-FBI surveillance of the League—and accuses the witness of perjury.

Petitioner's accusation is clearly meritless. The agent's testimony, read in context, addressed *FBI* surveillance of the League.[4] Additionally, there is no indication in the record that the agent, upon reviewing FBI files, actually did discover non-FBI surveillance of the League and withheld that finding from the court. At bottom, petitioner's accusations rest on the lack of specificity in the questions asked. The government witness's answers were accurate responses to unfocused inquiries.[5] Petitioner's allegations of perjury, based on ambiguities of a sort present in any trial transcript, are completely unfounded. See, *e.g.*, *United States* v. *Anderson*, 509 F.2d 312 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975); *United States* v. *Huckaby*, 400 F.2d 576 (6th Cir.), cert. denied, 393 U.S. 938 (1968).

2. Petitioner contends (Pet. 3) that Agent Comer's testimony concerning FBI surveillance was critical to his conviction. As we discuss later, that contention seems purely fanciful. But even if petitioner's exercise of hindsight leads him to believe that the DiDomenico Report could have been used to discredit Agent Comer, he is not entitled to a new trial. The report, on its face, has dubious impeachment value. But more importantly, petitioner had a full opportunity to use it for impeachment at trial. Petitioner does not challenge the district court's fully supported factual finding (Pet. App. 4a) that he had access to the report. Nor does he deny that he could have attempted to discredit the witness

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[4]Indeed, the questions cited by petitioner in the text of the petition themselves indicate that the agent was asked to testify about FBI surveillance. See Pet. 10 (citation omitted) (" 'was the [League] under any FBI investigation?' "); *id.* at 12 (citation omitted) (" 'I want to know about the observations by the FBI of John DiGilio and/or the [League].' ").

[5]Petitioner's assertion (Pet 3 (emphasis omitted)) that "[i]t is conceded by the district court and the government that the false testimony materially impacted upon the jury's verdict and indeed controlled it" is false. Neither the court nor the government ever made such a concession.

or secure clarification or amplification of the testimony by more precise questioning. Instead, petitioner seemingly believes that the government, rather than the defense, was obligated to assume the responsibility for clarification or impeachment.

Petitioner misapprehends the respective roles of the prosecution and the defense in a criminal trial. While the prosecution has an undoubted responsibility to prevent government witnesses from offering false testimony or deceiving the court, it is the defense's responsibility to pursue what it perceives as inconsistencies in government evidence. Despite petitioner's insistent and misleading characterizations to the contrary, the instant case does not involve false testimony. There was, at most, a *possible* inconsistency between Agent Comer's testimony and a government exhibit. This ambiguity could have been readily resolved by further questioning from the defense. In accordance with the adversarial responsibilities inherent in a criminal trial, see, *e.g., United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 7, the defense was obligated to probe further if it truly believed the doubtful proposition that a meaningful discrepancy existed. As Justice Marshall observed, "it is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence." *United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 14 (dissenting).

Petitioner simply ignores the well-established rule that defense counsel must either present possible impeachment evidence at trial or waive its use. Indeed, the rule applies even to evidence of false tesimony. As the Seventh Circuit has stated:

> "When a criminal defendant, during his trial, has reason to believe that perjured testimony was employed by the prosecution, he must impeach the testimony at

> trial and 'cannot have it both ways. He cannot withhold the evidence, gambling on acquittal without it, and then later, after the gamble fails, present such withheld evidence in a subsequent proceeding under 28 U.S.C. § 2255.' "

Ross v. *Heyne*, 638 F.2d 979, 986 (1980) (quoting *Evans* v. *United States*, 408 F.2d 369, 370 (7th Cir. 1969), which in turn quotes *Green* v. *United States*, 256 F.2d 483, 484 (1st Cir.), cert. denied, 358 U.S. 854 (1958)). See also, *e.g.*, *United States* v. *Iverson*, 648 F.2d 737, 739 (D.C. Cir. 1981); *United States* v. *Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980); *United States ex rel. Regina* v. *LaVallee*, 504 F.2d 580, 583 (2d Cir. 1974), cert. denied, 420 U.S. 947 (1975); *United States* v. *Meyers*, 484 F.2d 113, 116 (3d Cir. 1973); *Saville* v. *United States*, 451 F.2d 649, 651 (1st Cir. 1971). Certainly that principle should apply in the instant case, where petitioner can show no more than an ambiguity or possible incompleteness in a government witness's testimony. Indeed, its application is compelled by the "cause and prejudice" standard governing collateral attacks on convictions. See, *e.g.*, *United States* v. *Frady*, 456 U.S. 152 (1982).[6]

Petitioner attempts to avoid his trial obligations by citing various cases describing the government's duty to disclose evidence favorable to the defense (Pet. 32-35). We do not

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[6]Notably, petitioner places heavy reliance on the district court opinion in *Ross* v. *Heyne*, 483 F. Supp. 798 (N.D. Ind.), aff'd and rev'd in part, 638 F.2d 979 (7th Cir. 1980), to shift the duty of impeachment from the defense to the prosecution (Pet. 38-42). However, the court of appeals expressly refused to adopt the district court's "proposed absolute duty on the prosecutor" to correct, on his own initiative, false testimony. 638 F.2d at 985. The court of appeals permitted the defendant to challenge the use of false testimony in the habeas proceeding, but only because defense counsel's conflict of interest in the representation of a co-defendant prevented him from using the impeachment evidence at trial. *Id.* at 986. Once again, that case, unlike the present case, involved actual false testimony.

dispute the government's duty to disclose material exculpatory evidence. *E.g., United States* v. *Bagley*, No. 84-48 (July 2, 1985); *United States* v. *Agurs*, 427 U.S. 97 (1976); *Giglio* v. *United States*, 405 U.S. 150 (1972); *Brady* v. *Maryland*, 373 U.S. 83 (1963). But that principle is inapposite in the present case. The government did, in fact, provide the allegedly conflicting evidence to the defense (Pet. App. 4a). The present case does not "involve[] the discovery, after trial, of information known to the prosecution but unknown to the defense." *Agurs*, 427 U.S. at 103. See also, *e.g., Giglio*, 405 U.S. at 154 (emphasis added) ("whether the *nondisclosure* was a result of negligence or design, it is the responsibility of the prosecutor"). Petitioner, whether through intention or neglect, chose not to use the DiDomenico Report at trial. He cannot revisit that choice in collateral proceedings nine years after conviction.

3. Finally, even if it be assumed that the FBI agent's testimony was inconsistent with the DiDomenico Report and that the government, rather than petitioner, was obligated to point out the inconsistency, it is clear that the inconsistency would not have influenced the outcome of the trial. At most, the DiDomenico Report might indicate that non-FBI investigators, in maintaining surveillance of the League, did not observe a meeting between petitioner and George Kuczynski. Contrary to petitioner's assertions (Pet. 9), an investigator's failure to observe the meeting would not establish that the meeting did not take place. Indeed, the government was willing to stipulate at trial that, while it maintained surveillance of petitioner, it did not observe the meeting. Thus, the alleged inconsistency could not have prejudiced petitioner. See, *e.g., United States* v. *Frady*, 456 U.S. at 169-170. The court of appeals correctly ruled that petitioner, who has completed his sentence and is no longer on probation, is not entitled to collateral relief. Further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1985